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# 1993 International Trade Update: The GATT and NAFTA

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# 1993 International Trade Update: The GATT and NAFTA

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## I. INTRODUCTION

International trade is an area in which American agriculture has had significant success and maintains hope for continued improvement. However, it is an area subject to many difficult challenges. Two of the most significant are export competition and market access. Export competition, or competitiveness, includes attempts by exporting countries to enhance or expand export opportunities in order to create or maintain markets for their agricultural production. Subsidies and other unfair trade practices often result from attempts to increase competitiveness in foreign markets. Market access or, as some might more graphically describe it, protectionism, involves the erection of trade barriers, such as tariffs or quotas, by importing nations. The variety of mechanisms devised to accomplish these two fundamentally opposed objectives is astonishing. Both competitiveness and protectionism in the trade of goods have been addressed for years by the General Agreement on Tariffs and Trade (GATT). The limitations imposed by the GATT on both areas have established a trade liberalizing framework. However, the general perception is that agriculture has generally been excluded from the GATT.<sup>1</sup> Because the world has seen some significant contention in agricultural trade, recent GATT negotiations have included efforts to bring agricultural trade into the

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1. This statement represents a gross oversimplification of the facts. Agriculture is covered under the GATT as the GATT covers the trade in *goods*. This includes agricultural commodities as well as industrial products. However, agricultural goods have been treated differently under the GATT than industrial goods. While industrial goods have been subjected to a fairly tight discipline, there have been significant exceptions and exclusions built into the GATT, both in theory and in practice. The United States has been primarily responsible for some of the major exceptions accorded agriculture under the GATT. See generally, Henricus A. Strating, *The GATT Agriculture Dispute: A European Perspective*, 18 N.C. J. INT'L L. & COM. REG. 305 (1993).

framework of the agreement.<sup>2</sup> The current round of GATT talks, known as the Uruguay Round, was completed on December 15, 1993.<sup>3</sup>

In addition to the GATT, and perhaps largely because of its limited success, regional trading agreements have emerged as significant factors in providing a framework for trade.<sup>4</sup> Regional trading agreements, most significantly the one in the European Community (EC), have included agricultural trade to a greater or lesser extent.<sup>5</sup> For example, the United States and Canada entered into the Canada-U.S. Free Trade Agreement (CUSTA) in 1988, which is an important precursor to the North American Free Trade Agreement (NAFTA).<sup>6</sup> After a close and bitterly fought battle, the NAFTA passed a critical House of Representatives vote on November 17, 1993,<sup>7</sup> followed by a relatively painless Senate vote three days later.<sup>8</sup> NAFTA, effective January 1, 1994, unites Canada, the United States, and Mexico into a regional trading bloc slightly larger than the European Community, making the largest unified market in the world.<sup>9</sup>

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2. U.S. GEN. ACCOUNTING OFFICE, BRIEFING REPORT TO CONGRESSIONAL REQUESTERS, AGRICULTURAL TRADE NEGOTIATIONS: INITIAL PHASE OF THE URUGUAY ROUND, 8 (1988).
  3. The fast track legislation authorizing the negotiations of the Uruguay Round of the GATT gave until December 15, 1993 to finalize the agreement. On December 15, 1993, the 117 negotiating parties, including the United States and the European Community countries, signed the GATT. President Clinton promised to submit the agreement to Congress for passage under the fast track authorization. He has until April 15, 1994 to sign the accord. Once the President submits the agreement to Congress, the legislative body has 90 days to approve or reject it, as is. Extension of Uruguay Round Trade Agreement Negotiating and Proclamation Authority and of "Fast Track" Procedures to Implementing Legislation. Pub. L. No. 103-49, 107 Stat. 239, 240 (1993). See also *GATT: Easier Ride Expected After Tough NAFTA Battle*, CONG. Q. WKLY. REPT. 3463 (December 18, 1993).
  4. "Many countries have sought to complement the multilateral GATT process with a variety of bilateral and regional trade initiatives. Concern about the efficacy of the GATT process has led some countries to focus more on such arrangements than on their participation in the multilateral negotiations." JEFFREY J. SCHOTT, MORE FREE TRADE AREAS?, 27 POLICY ANALYSES IN INTERNATIONAL ECONOMICS, 1 (May 1989). See also Tim Josling, *The Treatment of National Agricultural Policy in Free Trade Areas*, (International Agricultural Trade Research Consortium Working Paper No. 92-7, June 1992); Frederick M. Abbott, *GATT and the European Community: A Formula for Peaceful Coexistence*, 12 MICH. J. INT'L. L. 1 (1990).
  5. Tim Josling, *The Treatment of National Agricultural Policy in Free Trade Areas* (International Agricultural Trade Research Consortium Working Paper No. 92-7 June 1992).
  6. United States-Canada Free-Trade Agreement Implementation Act of 1988, 19 U.S.C.A. § 2112 (West Supp. 1993). Exec. Order No. 12662, 54 Fed. Reg. 785 (1988) reprinted as amended in 19 U.S.C.A. § 2112 (West Supp. 1993).
  7. H.R. 3450, 103rd Cong., 1st Sess. (1993) (enacted).
  8. *Id.*
  9. Richard H. Steinberg, *The North American Free Trade Agreement: A Legal Analysis of Effects and Opportunities*, 5 LAWS OF INT'L TRADE, 1410.001, 1410.002 (1993).

The successful completion of the Uruguay Round of GATT negotiations and the ratification of NAFTA are important to agriculture. Although the passage of the GATT agreement in the U.S. Congress is not absolutely certain, the outcome of these processes will determine the nature of the international trading system for the foreseeable future. This Article will first examine the GATT, since it provides a more general and comprehensive framework, and then look at NAFTA.

## II. THE GENERAL AGREEMENT ON TARIFFS AND TRADE (GATT)

### A. History

Before the end of World War II, the United States participated as a major leader in attempting to establish a more liberal world trading system.<sup>10</sup> These efforts to liberalize trade resulted in the establishment of the General Agreement on Tariffs and Trade which was designed to be an interim agreement pending the establishment of the International Trade Organization (ITO).<sup>11</sup> The ITO was to be the organization responsible for regulating international trade. However, the necessary approval for the ITO never made it through the U.S. Congress, and the GATT was left in place, continuing far longer than anticipated and taking the place of the ITO.<sup>12</sup> In the absence of the ITO, the GATT has been "both the written set of rules for the conduct of international trade and an organization that administers those rules."<sup>13</sup>

The GATT's written rules have evolved through a series of multi-lateral trade negotiations known as rounds.<sup>14</sup> The eighth round of the GATT negotiations began in 1986 in Punta del Este, Uruguay,<sup>15</sup> and

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10. For an excellent introduction to the origination of the GATT, see JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 35-57 (1969).

11. *Id.*

12. An examination of the trade negotiations which resulted in the establishment of the GATT is beyond the scope of this article. For a brief description of the process, see David R. Purnell, *A Critical Examination of the Targeted Export Administration Program, Its Transformation Into the Market Promotion Program and Its Future*, 18 N.C. J. INT'L L. & COM. REG. 597-98 (1993).

13. Strating, *supra* note 1, at 308. For an insightful discussion of the institutional nature of the GATT and the role it plays in rule making, dispute settlement, enforcement, and other similar processes, see Kenneth W. Abbott, *GATT as a Public Institution: The Uruguay Round and Beyond*, 18 BROOK. J. INT'L. L. 31 (1992).

14. Those rounds have been as follows: 1. Geneva - The initial negotiation of the GATT - 1947, 2. Annecy, France - 1949, 3. Torquay, England - 1950, 4. Geneva - 1955, 5. Dillon Round - 1960-61, 6. Kennedy Round - 1962-67, 7. Tokyo Round - 1973-79. JOHN H. JACKSON, *IMPLEMENTING THE TOKYO ROUND*, 10-17 (1984).

15. Spencer W. Waller, *Symposium: The Uruguay Round and the Future of World Trade—Introduction*, 18 BROOK. J. INT'L. L. 1 (1992).

concluded on December 15, 1993. The purpose of the GATT was to reduce tariffs and other barriers to trade and reduce or eliminate discriminatory treatment in the international trading system.<sup>16</sup> "The first five rounds were characterized by item-by-item negotiations for the reductions of tariffs", and the sixth and seventh rounds took an across the board approach to tariff reduction.<sup>17</sup> Until the seventh round, there was little success in addressing non-tariff barriers.<sup>18</sup>

## B. Current Status

Until the present time, the GATT has focused on trade in manufactured goods, excluded trade in services and intellectual property, and has had limited application to agriculture. The Uruguay Round was slated to bring all three of these areas more fully into the GATT framework.<sup>19</sup> The negotiations successfully addressed trade in services and intellectual property, but have run into serious difficulties. One of the most troublesome issues to resolve has been agricultural trade.<sup>20</sup> Prior to December 15, 1993, there was considerable uncertainty about the ability of the negotiating nations to come to an agreement. If the Uruguay Round of the GATT was not successfully completed by December 15, both the United States Trade Representative and the administrator of the GATT indicated that it would not happen.<sup>21</sup> The authorization granted for the GATT negotiations by the U.S. Congress expired at that time.<sup>22</sup>

### 1. Export Competition

#### a. Subsidies

The objectives of the United States and several other countries in the Uruguay Round of the GATT negotiations have been to liberalize trade in agriculture by reducing subsidies to agricultural production in the exporting nations and eliminating non-tariff barriers in importing countries.<sup>23</sup> The considerable difficulty encountered in reaching these objectives caused the Uruguay Round negotiations to become

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16. Strating, *supra* note 1, at 308.

17. JACKSON, *supra* note 14, at 12.

18. JACKSON, *supra* note 14, at 12.

19. John H. Jackson, *GATT and the Future of International Trade Institutions*, 18 BROOK. J. INT'L. L. 11 (1992).

20. Strating, *supra* note 1.

21. U.S. Trade Representative Mickey Kantor said there would be no extension of the December 15 deadline on the part of the United States. GATT Director General Peter Sutherland also indicated the other participants in the negotiations had accepted the December 15 deadline. *USTR Kantor Says Dec. 15 Deadline for Completing GATT Talks is Final*, 10 INT'L TRADE REP. No. 41 1775, 1775 (Oct. 20, 1993).

22. Pub. L. No. 103-49, 107 Stat. 239, 240 (1993).

23. U.S. GEN. ACCOUNTING OFFICE, *supra* note 2, at 1-3.

protracted.<sup>24</sup> Subsidies on primary products, including most agricultural commodities, are prohibited under the GATT Article XVI:4.<sup>25</sup> However, agriculture, once again, receives special treatment. Contracting parties to the GATT are free to provide export subsidies in order to maintain their "equitable share of world export trade in that product."<sup>26</sup> The most controversial issue has been the high rate of subsidies on EC agricultural production.

The French, in particular, have opposed the reduction of agricultural subsidies.<sup>27</sup> In November 1992, the EC and the United States finally came to an agreement on the reduction of agricultural subsidies.<sup>28</sup> Among other things, the Blair House agreement commits the EC to a twenty-one percent reduction of subsidized agricultural exports over six years, a thirty-six percent reduction in the value of agricultural subsidies, and a twenty percent reduction in farm support prices.<sup>29</sup> The French farmers militantly opposed these reductions, claiming that they go farther than the cuts agreed to among the European Community nations in the Common Agricultural Policy negotiations in July 1992.<sup>30</sup> The United States, supported in this case by many other countries, was unwilling to accept changes to the Blair House agreement.<sup>31</sup> The conflict with the French over the issue of subsidies was seen as the major stumbling block to the successful culmination of the Uruguay Round.<sup>32</sup>

Toward the end of the negotiations, the French farm lobby demonstrated a willingness to compromise on its demands and accept the twenty-one percent reduction in subsidized agricultural exports in return for three concessions by the U.S. side.<sup>33</sup> The lobby still wanted to

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24. The GATT negotiations were originally scheduled to conclude in December 1990, just four years after the Uruguay Round. Several deadlines came and went before the December 15, 1993 deadline was set. *Seven Years of Struggle Over Farming at GATT Talks*, THE REUTER EUROPEAN COMMUNITY REPORT, Sept. 20, 1993.

25. Stefan Tangermann, *Proposals for a "Rule-Oriented" Liberalization of International Agricultural Trade*, 5 THE NEW GATT ROUND OF MULTILATERAL TRADE NEGOTIATIONS: LEGAL AND ECONOMIC PROBLEMS 243, 250 (1991).

26. GATT art. XVI:3.

27. William A. Kerr, *International Trade in Beef — Technical Issues for the Current GATT Negotiations*, J. AGRIC. TAX'N & L. 55, 57 (1988).

28. Keith Bradsher, *The Trade Accord: Europeans Agree With U.S. On Cutting Farm Subsidies; French Withhold Support; 2 Sides Compromise*, N.Y. TIMES, Nov. 21, 1992, § 1 at 1.

29. *Seven Years of Struggle Over Farming at GATT Talks*, supra note 24.

30. *European Community Commission Sympathetic to France on Blair House, Opposes Renegotiation*, Int'l Trade Daily (BNA), (Sept. 20, 1993.)

31. *Id.*

32. *Japan Warned to Open Rice Markets, Avoid Trade Talks Collapse*, AGENCE FRANCE PRESSE, Oct. 29, 1993.

33. Juliette Rouillon, *French Farmers Scaling Down Blair House Demands*, THE REUTER EUROPEAN COMMUNITY REPORT, Oct. 27, 1993.

soften the interpretation of the minimum access clause requiring the EC to accept a small percentage of food duty free.<sup>34</sup> It wanted to restrict the U.S. corn (livestock feed) exports to the EC.<sup>35</sup> It also wanted the EC to be permitted to export existing surplus stocks free of the Blair House agreement restrictions.<sup>36</sup> This concession was a major move on the part of the French farm lobby and signalled a considerable improvement in the chances of a successful Uruguay Round.

Ultimately, the Uruguay Round agreement contained the twenty-one percent reduction in volume of subsidized agricultural exports, the reduction of thirty-six percent in money spent on agricultural subsidies, and the twenty percent reduction in income support payments for farmers.<sup>37</sup> It also retained a market access clause requiring market access of at least three percent of domestic consumption, rising to six percent over time.<sup>38</sup>

## 2. *Market Access*

The barriers that importing or prospective importing countries erect to imports take many forms. Some representative barriers are health and safety regulations, technical and quality standards, and quotas. Tariffication is the process of converting these non-tariff barriers into tariff barriers. Once the tariffs are established they can be regulated and reduced. Future GATT negotiations can address specific tariffs or can target across the board tariff reductions. Eventually, the process could result in the elimination of barriers.

### a. *Tariffication*

Bringing the tariffication process to the agricultural sector is a major development of the GATT. The replacement of non-tariff barriers with roughly equivalent tariff barriers allows for the negotiation of lower tariff levels within a multilateral trading relationship. The negotiations of the Uruguay Round resulted not only in the tariffication of some non-tariff barriers, but saw the imposition of a schedule for the reduction of those tariffs.<sup>39</sup>

### b. *Quotas*

Another difficult problem in the Uruguay Round of the GATT is the quota issue. Some countries protect certain production capabili-

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34. The percentage of food accepted duty free under the minimum access clause is three to five percent. *Id.*

35. *Id.*

36. *Id.*

37. *Highlights of GATT Accord*, CONG. Q. WKLY. REPT. 3464 (Dec. 18, 1993).

38. *Id.*

39. *GATT Uruguay Round Ends in Geneva; Major Provisions of Deal Outlined*, (BNA) (Dec. 17, 1993).



ties for reasons such as food security.<sup>40</sup> For example, Japan has maintained a strict barrier to rice imports in order to sustain rice self sufficiency. Other members of the GATT, such as Australia, have problems with this restriction and have indicated a possible failure of the round if the Japanese do not consent to an across the board tariffication.<sup>41</sup> The GATT has historically contained provisions which allow the imposition of quantitative restrictions on imports under specific conditions.<sup>42</sup>

### 1. *The Agricultural Waiver*

In the early 1950s, under section 22 of the Agricultural Adjustments Act, the United States imposed quotas on imports of certain dairy products and sugar among other things.<sup>43</sup> The United States failed to meet the exceptions provided under the GATT permitting the imposition of these quotas. The United States sought and obtained a waiver from the other parties to the GATT allowing quotas to be imposed under section 22 in spite of the GATT prohibition.<sup>44</sup> This waiver is still in place today and has been the source of a great deal of negative feeling toward the United States by other parties to the GATT. If the United States can obtain a waiver of the terms of the GATT in relation to its agricultural policy, other countries are going to feel entitled to similar treatment. This continues to be a particularly troublesome credibility problem for U.S. negotiators, especially when the United States attempts to take the lead in negotiating terms including freer market access.

## C. Additional Concerns

Many countries have expressed a real concern about the potential failure of the GATT and the impact on the world trading system. In response to these concerns, as well as concerns regarding the EC and

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40. "Rice policy in Japan is probably the strongest case of food security driven price policy that can be found in the world today." DALE E. HATHAWAY, *Agriculture and the GATT: Rewriting the Rules*, POLICY ANALYSES IN INTERNATIONAL ECONOMICS 20, 27-30 (Inst. for Int'l Economics ed. Sept. 1987).

41. *Japan Warned to Open Rice Markets, Avoid Trade Talks Collapse*, *supra* note 32. Kohei Murayama, *Bad Rice Harvest Brings More Pressure to Open Market*, JAPAN ECONOMIC NEWswire, Oct. 29, 1993.

42. Quantitative restrictions or quotas on agricultural commodities are prohibited under Article XI of the GATT. However, a variety of exceptions are provided to account for particular problems, such as balance of payments problems, classification, grading and marketing programs on domestic products, and domestic surplus problems. HATHAWAY, *supra* note 40, at 108-11.

43. Dale E. Hathaway, *Agriculture*, COMPLETING THE URUGUAY ROUND: A RESULTS ORIENTED APPROACH TO THE GATT TRADE NEGOTIATIONS 51, 53-55 (1990).

44. Rex J. Zedalis, *Agricultural Trade and Section 22*, 31 DRAKE L. REV. 587, 619-20 (1981-82).

NAFTA, proposals for other regional trading blocs have been advanced.<sup>45</sup> A Western Hemisphere Free Trade Area has been proposed.<sup>46</sup> Among several other options, a Pacific Free Trade Area trading bloc, including the United States and Australia, has also been proposed.<sup>47</sup> Another proposal, made in 1990 by the current Prime Minister of Malaysia, calls for an East Asian Economic Caucus (EAEC), to function like NAFTA, but excluding the United States and Australia.<sup>48</sup>

### III. THE NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA)

#### A. History

##### 1. Canada-U.S. Free Trade Agreement (CUSTA)

One of the two free trade areas of real significance to emerge since the GATT came into being is the recent Canada-U.S. Free Trade Agreement (CUSTA).<sup>49</sup> It went into effect January 1, 1989<sup>50</sup> and provided a tariffication of agricultural trade barriers between the two countries along with a gradual elimination of the tariffs over a ten year period.<sup>51</sup> Some conditions can give rise to temporary tariffs to protect certain agricultural sectors from excessive harm.<sup>52</sup> In addition, the countries agreed to harmonize health and sanitary regulations in order to eliminate some of the more invisible non-tariff barriers to trade.<sup>53</sup> The United States and Canada also agreed to eliminate any direct subsidies on products exported to the other coun-

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45. SCHOTT, *supra* note 4, at 34-54.

46. Gary C. Hufbauer *et al.*, *Options for a Hemispheric Trade Order*, 22 U. MIAMI INTER-AM. L. REV. 261 (1991); John Whalley, *CUSTA and NAFTA: Can WHFTA Be Far Behind?*, 30 J. COMMON MKT. STUD. 125 (1992).

47. An interesting collection of essays published by the Institute for International Economics, based on papers presented at a conference held Oct. 31 - Nov. 1, 1988, takes a look at a broad range of options for bilateral or multilateral, regional free trade area. The essay on the Pacific Free Trade Area is just one in this collection. PETER DRYSDALE & ROSS GARNAUT, *A Pacific Free Trade Area*, FREE TRADE AREAS AND U.S. TRADE POLICY, 217 (1989).

48. John P. Byrley, *Regional Arrangements, The GATT, and the Quest for Free Trade*, 6 FLA. J. INT'L. L. 323, 323 (1992); *World: Are Trade Wars Looming?*, BUS. TIMES, Oct. 28, 1993, at 4; *Malaysia Says Japan in EAEC Will Auger Well For Region*, JAPAN ECONOMIC NEWSWIRE, Jan. 6, 1994.

49. The CUSTA text is printed at H.R. Doc. No. 216, 100th Cong. 2d Sess. 297 (1988).

50. SCHOTT, *supra* note 4.

51. UNITED STATES GENERAL ACCOUNTING OFFICE, REPORT TO THE HONORABLE LOUISE M. SLAUGHTER, HOUSE OF REPRESENTATIVES, INTERNATIONAL TRADE: IMPLEMENTATION OF THE U.S.-CANADA FREE TRADE AGREEMENT, 12 (Oct. 1992).

52. H.R. Doc. No. 216, art. 702, 100th Cong., 2d Sess. 297 (1988).

53. H.R. Doc. No. 216, art. 708, 100th Cong., 2d Sess. 297 (1988).

try and to consider the other country in providing export subsidies for products shipped to other nations.<sup>54</sup>

*a. Dispute Resolution*

The CUSTA also included dispute settlement mechanisms; a Canada-U.S. Trade Commission to hear disputes arising under the interpretation and implementation of the CUSTA and binding binational arbitral review for anti-dumping and countervailing duty disputes.<sup>55</sup>

The United States has maintained a steady stream of complaints under the CUSTA against three Canadian agricultural groups: the soft lumber industry, the pork producers, and the wheat producers.<sup>56</sup> Some Canadians have come to feel that the complaints seldom have merit and have been made as part of a systematic pattern of harassment by related U.S. industries, particularly the softwood lumber industry and pork producers.

**B. North American Free Trade Agreement (NAFTA)  
Negotiations**

Following the trade liberalization policies of the Salinas government in Mexico, the United States and Mexico commenced free trade talks. Canada insisted on inclusion in the talks in order to protect its interests. The result has been the negotiation of a trilateral free trade agreement, the North American Free Trade Agreement (NAFTA).<sup>57</sup> NAFTA is an agreement that liberalizes trade and investment relations among the three North American countries. After a particularly rough ride and a great deal of uncertainty, NAFTA finally passed the critical congressional hurdle in the United States.<sup>58</sup>

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54. H.R. Doc. No. 216, art. 701, 100th Cong., 2d Sess. 297 (1988).

55. Chapter 18 of the CUSTA provides that any disputes that relate to the interpretation or application of the CUSTA will be referred to the Canada-United States Trade Commission. James F. Smith & Marilyn Whitney, *The Dispute Settlement Mechanism of the NAFTA and Agriculture*, 68 N.D. L. REV. 567, 571-73 (1992). Chapter 19 of the CUSTA provides that any disputes that relate to anti-dumping and countervailing duty may be referred to Binational Arbitral Review Panels. *Id.* at 583-86.

56. "Even the strongest defenders of free trade have been dismayed by continuing trade complaints by U.S. corporations against Canadian exports." Ian Austen, *Trade Deals Likely Safe With Liberals*, THE OTTAWA CITIZEN, Oct. 27, 1993, at E2.

57. THE GOVERNMENTS OF CANADA, THE UNITED MEXICAN STATES AND THE UNITED STATES OF AMERICA, DESCRIPTION OF THE PROPOSED NORTH AMERICA FREE TRADE AGREEMENT, Aug. 12, 1992.

58. North American Free Trade Agreement Implementation Act, PUB. L. NO. 103-182, 107 Stat. 2057 (1993).

### 1. *Major Provisions of NAFTA*

NAFTA provides a comprehensive framework for the implementation of free trade among Canada, the United States, and Mexico.<sup>59</sup> This liberalization not only includes resolution of market access and export promotion issues, but also includes provisions allowing freer investment opportunities.

The agreement calls for elimination of non-tariff barriers through tariffication and harmonization of barriers that cannot reasonably be subjected to tariffication, such as health and sanitary standards for agricultural products.

## C. **Current Status**

Implementation of NAFTA was scheduled for January 1, 1994. This required legislative ratification in all three countries and implementation of NAFTA in domestic law.

### 1. *Canadian Status and Concerns*

Under the Progressive Conservative government of Prime Minister Brian Mulroney, and subsequently Prime Minister Kim Campbell, NAFTA enjoyed the full backing and support of the Canadian government. In fact it was a 1985 meeting between Prime Minister Mulroney and President Reagan of the United States that initiated the Canada-U.S. free trade talks. NAFTA was approved by the Canadian Parliament while the Progressive Conservative Party was in power. However, NAFTA could not be proclaimed into law in Canada until it had been ratified in the United States and Mexico. In the meantime, Canada held a general election on October 25, 1993.<sup>60</sup>

#### a. *Election of the Liberal Government*

The Progressive Conservative Party went from 158 seats, a majority, in the Canadian Parliament to two seats.<sup>61</sup> The Liberal Party, led by Jean Chretien, swept to a stunning victory in the elections garnering 178 seats.<sup>62</sup> The new Liberal Prime Minister of Canada immediately indicated a need to address subsidies, countervailing duties, and energy before proclaiming NAFTA into law.<sup>63</sup> This call sounded to some like a demand to reopen the NAFTA negotiations. President

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59. See generally, GARY C. HUFBAUER & JEFFREY J. SCHOTT, *NORTH AMERICAN FREE TRADE: ISSUES AND RECOMMENDATIONS*, (1992); NORA LUSTIG, *NORTH AMERICAN FREE TRADE: ASSESSING THE IMPACT* (1992).

60. *Canada's Tories Get the Boot*, THE WASH. TIMES, Oct. 29, 1993, at A22.

61. *Id.*

62. *Id.*

63. John Geddes & Peter Morton, *Chretien Firm on NAFTA*, FIN. POST, Oct. 28, 1993, at 15.

Salinas of Mexico and President Clinton of the United States both responded with a clear and unequivocal message that the agreement is in place and negotiations will not be reopened.<sup>64</sup> The resolution to this problem will be the continued working out of details that refine the implementation of NAFTA, but do not require renegotiation of the agreement itself. Many of these aspects do not necessarily have to be negotiated before the implementation of the agreement.

1. *Additional Concerns: Subsidies, Countervailing Duties, Dispute Resolution, and Energy*

Of these issues, Prime Minister Chretien considers the subsidies and anti-dumping codes to have the most significance.<sup>65</sup> President Clinton does not believe the discussion of these issues will require reopening the NAFTA negotiation.<sup>66</sup> Under the CUSTA, the terms of the agreement allowed a seven year period to negotiate these items. Although this has not yet occurred, the seven year period has not passed, so negotiations could take place under the mandate of the CUSTA. This remains one of the most problematic and uncertain aspects of NAFTA. How well the dispute resolution process will function will only be seen with time.

a. *Subsidies*

The Canadians are interested in ending the disputes with the United States and see the formal definition of acceptable government subsidies as a possible solution.<sup>67</sup>

b. *Anti-Dumping*

Dumping is the act of selling goods abroad at an unacceptably low price in order to garner market share. The price is typically defined as less than the commodity could be sold for on the domestic market. Canada would like to see a more comprehensive anti-dumping code built into NAFTA.<sup>68</sup>

c. *Dispute Resolution Mechanism*

So far, the Canadians have not been entirely satisfied with the dispute resolution mechanism under the CUSTA and want improvement in NAFTA. They would especially like to put an end to what they consider to be harassment tactics employed by U.S. competitors through

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64. Calvin Woodward, *Mexico Won't Budge on Trade Deal*, CALGARY HERALD, Oct. 29, 1993, at A3.

65. Austen, *supra* note 56.

66. Austen, *supra* note 56.

67. Austen, *supra* note 56.

68. Austen, *supra* note 56.

the dispute resolution mechanisms.<sup>69</sup> Proposals in the United States to allow U.S. judicial review of bilateral appeal panel decisions have pushed some Canadian supporters of NAFTA into a tentative opposition.<sup>70</sup> A swift reaction from the Canadians immediately after the Canadian elections seems to have had the desired effect of eliminating the efforts by the U.S. Senate.<sup>71</sup>

*d. Energy Industry Protection*

One of the items Prime Minister Chretien indicated Canada wanted was the same protection for its energy industry that Mexico received in the negotiations on the NAFTA. However, statements from energy industry persons indicate that the Canadian industry is not concerned about receiving these same concessions.<sup>72</sup> The energy industry in Mexico is a state owned and regulated industry. In Canada, the energy industry is primarily privately held and the Conservative government has deregulated the industry. The industry doubts that it needs to retain the right to abrogate long-term contracts to protect energy reserves.<sup>73</sup>

*2. Mexican Status and Concerns*

*a. Trade and Investment Liberalization*

Since the election of the Salinas de Gortari administration, Mexico has undergone a radical process of trade and investment liberalization.<sup>74</sup> This has been more than a token modification of some trade barriers. Land reform was conducted at a fundamental level, with a modification of the Mexican Constitution of 1917, to allow private ownership of agricultural land.<sup>75</sup> Some of the reforms are designed to provide a more favorable investment climate and remove some of the most significant barriers to trade.

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69. To illustrate the nature of the Canadian frustration, a look at the dispute pattern under the CUSTA would be helpful. Twenty-three of the thirty-one anti-dumping and countervailing duty cases brought before bilateral arbitral review panels were brought because of U.S. complaints. Homer E. Moyer, Jr., *Chapter 19 of the NAFTA: Binational Panels as the Trade Courts of Last Resort*, 27 INT'L LAW. 707, 709-10 (1993).

70. Kelly McParland, *Ottawa Rushes to Block U.S. Changes to NAFTA*, FIN. POST, Oct. 29, 1993, at 4.

71. Of the different NAFTA Implementation Acts proposed in the Congress, H.R. 3450 version 2 was passed, rather than S. 1627.

72. Peter Morton, *Energy Sector Uneasy Over Liberal's Pledge*, FIN. POST, Oct. 28, 1993, at 14. See also *Don't Hamper Energy Sector*, FIN. POST, Oct. 28, 1993, at 16.

73. Peter Morton, *Energy Sector Uneasy Over Liberal's Pledge*, FIN. POST, Oct. 28, 1993, at 14.

74. MATTHEW SHANE & DAVID STALLINGS, USDA, *THE MEXICAN ECONOMY IN THE 1990's: MARKETS ARE IN; STATE CONTROL IS OUT*, (No. 635 Oct. 1991).

75. Wesley R. Smith, *Salinas Prepares Mexican Agriculture for Free Trade*, HERITAGE FOUNDATION REPORTS, No. 914 (1992).

### 3. *U.S. Status and Concerns*

#### a. *Economic Impact*

Debate about the economic impact of NAFTA has been vigorous, but few, if any, serious economists maintain that freer trade and investment will be economically unsound.<sup>76</sup> Rather, opponents of NAFTA have identified a few areas where the impact will possibly be negative. The most significant of these concerns revolve around the issues of jobs and the environment.

#### b. *Side Agreements*

In the election campaign, Clinton addressed some of those labor and environmental concerns and indicated that, if elected, he would require side agreements on labor and environment be negotiated prior to the implementation of NAFTA. That promise was kept.<sup>77</sup> The NAFTA side agreements were signed, but Clinton has since attempted to placate some Republicans by suggesting that the United States would not withdraw from NAFTA if Canada or Mexico pulled out of the side agreements.<sup>78</sup>

#### 1. *Labor*

##### a. *Job Loss or Creation*

Labor has been the central focus of the debate over NAFTA. Opposition to the agreement focuses on job flight to Mexico while support for the agreement focuses on the long term economic improvement in both countries which arguably will create more jobs.<sup>79</sup> This issue created the most heat in the U.S. debate, with organized labor siding with Ross Perot against President Clinton and many Republicans.<sup>80</sup>

##### b. *Immigration Concerns*

A significant domestic concern in the United States over the past several years has been the increasing flow of immigrant workers

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76. This work evaluates several of the economic analyses of the NAFTA. HUFBAUER & SHOTT, *supra* note 59.

77. North American Agreement on Labor Cooperation, H.R. Doc. No. 160, 103d Cong., 1st Sess., 48, (1993); North American Agreement on Environmental Cooperation, H.R. Doc. No. 160, 103d Cong., 1st Sess., 5 (1993).

78. Any of the three parties to the NAFTA may withdraw from the agreement with six months notice. President Clinton announced on October 28, 1993 that the United States would not be compelled to withdraw from NAFTA if either of its partners withdrew from the side agreements on labor and the environment. Peter Behr & Thomas B. Edsall, *Clinton Concedes Point on NAFTA Side Pacts*, THE WASH. POST, Oct. 29, 1993, at G2.

79. See *NAFTA Implementation*, 51 CONG. Q. 3448 (Dec. 18, 1993).

80. *Clinton Forms New Coalition To Win NAFTA's Approval*, 51 CONG. Q. 3181, 3181-83, (Nov. 20, 1993).

crossing illegally from Mexico into the United States. Substantial political, administrative, and enforcement efforts have gone into finding a solution to this problem, without tangible success. Supporters of NAFTA argue that the tide of illegal immigration from Mexico would be stemmed by job creation in Mexico that would result from the enactment of NAFTA.

## 2. *Environment*

In addition to the side agreement that has been negotiated, the United States District Court for the District of Columbia ruled on June 30, 1993 that the government is required to prepare an Environmental Impact Statement (EIS) under the National Environmental Policy Act (NEPA).<sup>81</sup> The government immediately appealed this decision to the Court of Appeals for the D.C. Circuit. On appeal, the D.C. Circuit reversed the district court<sup>82</sup> and the United States Supreme Court denied certiorari.

### c. *Legal Concerns*

#### 1. *Constitutional Issues*

##### a. *Separation of Powers*

At least one commentator in the United States has suggested that the arbitral review process of CUSTA "offends the separation of powers."<sup>83</sup> Professor Chen indicates that the FTA violates the indepen-

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81. Not only did the Court rule that an EIS was required, but ordered the government to produce an EIS on NAFTA before the President submitted it to Congress. This is based on the requirement of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2)(c)(1988) which states that "every recommendation or report on proposals for legislation . . . significantly affecting the quality of the human environment" have an EIS prepared by the federal agency preparing the report or recommendation. *Public Citizen v. Office of the U.S. Trade Representative*, 822 F. Supp. 21 (D.D.C.), *rev'd*, 5 F.3d 549 (D.C.Cir. 1993), *cert. denied* 114 S. Ct. 685 (1994).

82. The D.C. Circuit Court of Appeals reversed on the basis that the submission of NAFTA to Congress did not constitute "final agency action" under the Administrative Procedure Act (APA). Only final agency action is subject to the requirement of the APA, and the plaintiffs in this case had to rely on the APA, since there is no private right of action under NEPA. Since the submission of NAFTA to Congress is wholly discretionary with the President of the United States, and the President could choose to renegotiate NAFTA, submit it as is, or not submit it at all, the circuit court determined that there was no final agency action. The action of the President, not the action of the USTR, affects the plaintiffs, and the action of the President is not agency action under the APA. *Public Citizen v. Office of the U.S. Trade Representative*, 5 F.3d 549 (D.C. Cir. 1993), *cert. denied* 114 S. Ct. 685 (1994).

83. Jim C. Chen, *Appointments with Disaster: The Unconstitutionality of Binational Arbitral Review Under the United States-Canada Free Trade Agreement*, 49 WASH. & LEE L. REV. 1455, 1457 (1992).



dence of the judiciary by not respecting Article III requirements for federal judicial review and violates the Appointments Clause by failing to meet its requirements for the method of appointment of the panelists.<sup>84</sup> Although Professor Chen makes a rather persuasive and compelling argument, most legal scholars who have commented on these issues do not agree that there is a constitutional problem.<sup>85</sup>

*b. Sovereignty*

In addition to the legal questions raised in the separation of powers argument, concerns have been raised in the United States about the loss of sovereignty represented by having international review panels adjudicate trade disputes. To some, the surrender of any judicial function to an international review body, whether or not it has U.S. representation, amounts to a surrender of some degree of sovereignty.<sup>86</sup>

#### IV. CONCLUSIONS

The successful conclusion of the Uruguay Round of the GATT and ratification of NAFTA should result in a more stable trading environment and a more comprehensive system of agreements providing a framework for trade. The tariffication of trade barriers will allow member countries to address trade issues more easily. It will also give the countries a greater incentive to honor the terms of the GATT.

Failure to implement the results of GATT negotiations could result in increased trade barriers and increased subsidies to domestic producers. Countries have routinely violated and ignored GATT obligations relating to agriculture. Although agriculture has been the focus of the latest GATT negotiations, member nations may ignore their obligations as they have in the past. If this pattern of market access restrictions and unfair export competition practices continues, greater reliance on regional trading blocs may result. The United States would be forced to begin new negotiations on a variety of regional trading agreements. However, if the Uruguay Round is successfully implemented, the role that regional free trade areas will play is uncer-

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84. *See generally id.*

85. As explicitly acknowledged in his article, Jim Chen takes a position that is manifestly against the weight of scholarly opinion. He states: "Contrary to the virtual consensus among observers of the FTA, this Article argues that the FTA violates both Article III and the Appointments Clause of the Constitution." *Id.* at 1456-57.

86. "Canada and the United States have thus relinquished a bit of their individual sovereignty over tariffs and trade in a joint effort to . . ." liberalize trade. William K. Ince & Michele C. Sherman, *Binational Panel Reviews Under Article 19 of the U.S.-Canada Free Trade Agreement: A Novel Approach to International Dispute Resolution*, 37 *FED. BAR NEWS & J.* 136, 136 (1990).

tain. Will they flourish or will the Uruguay Round set the stage for a diminution of the significance of these regionalized free trade areas?